IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1945

THOMAS K. FORCADE, et al.,

Plaintiffs-Appellees,

v.

H. STUART KNIGHT, et al.,

Defendants-Appellants.

Appeal from the United States
District Court for the District of Columbia

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

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TABLE OF CASES AND AUTHORITIES

*Cases or authorities chiefly relied upon.

Statutes and Regulations:

Other Authorities:

/

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THOMAS FORCADE, et al.,

Plaintiffs-Appellees,

v.

H. STUART KNIGHT, Director
United States Secret Service, et al.,

Defendants-Appellants

Appeal from the United States
District Court for the District of Columbia

BRIEF FOR DEFENDANTS-APPELLANTS

I. Whether the issuance or denial of White House press passes presents any justiciable issue.

II. Whether the District Court erred in concluding plaintiffs' rights under the First Amendment of the United States Constitution were infringed by denial to them on security grounds of a White House press pass.

III. Whether the District Court erred in concluding plaintiffs' due process rights were violated by the procedures presently in effect regarding presidential security in the White House.

This matter has not previously been before the Court. No related case is presently pending or may be presented to this Court to the knowledge of the undersigned counsel.

REFERENCES TO PARTIES AND RULINGS

This is an appeal from a decision of the United States District Court for the District of Columbia, Chief Judge William B. Jones, rendered by Memorandum and Order dated July 7, 1976, in which plaintiffs' motion for summary judgment was granted, defendants' motion to dismiss or in the alternative for summary judgment was denied, and the defendants were ordered to take certain action to modify their procedures for granting White House press passes in conformity with the District Court's Memorandum. (Appellant's Appendix, p.35).

Parties to the litigation whose identities are not revealed by the caption on appeal include:

Defendants: Ronald H. Nessen, Press Secretary to the President
William E. Simon, Secretary of the Treasury
John W. Warner, Assistant to the Director, Secret Service
Plaintiffs: Robert Sherrill

STATEMENT

This action involves a constitutional challenge to the traditional procedures for determining the grant or denial of applications for White House press passes. On June 22, 1973, plaintiffs, two newsmen, filed their complaint in the United

States District Court seeking declaratory and injunctive relief against the President's Press Secretary, the Secretary of the Treasury, the Director and the Deputy Director, United States Secret Service.[1] They contended that the refusal to grant them White House press credentials violated the First, Fifth, and Ninth Amendments to the Constitution as well as Sections 556-558 of the Administrative Procedure Act, Title 5, United States Code. The factual background of the instant case is set forth in detail below.

b6
b7C

A. Since 1965, plaintiff [redacted] has been the Washington Correspondent for The Nation. After receiving credentials for membership in the Senate and House Periodical Press Galleries, [redacted] was denied White House press credentials by the Secret Service on May 3, 1966.[2] The reasons

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1 / The present defendants were the successors in office of the officials named in the complaint, substituted pursuant to 25(d) F.R.Civ.P.

2 / White House press passes are issued to journalists on application by their editors to the President's Press Secretary. Such journalists must be resident in Metropolitan Washington, have a need to report from the White House on a daily basis, and must be accredited by the appropriate Congressional Press Gallery. After the White House Press Office determines these qualifications are met, the application is referred to the United States Secret Service for a clearance as to potential danger to the physical safety of the President and his family. This is essential because the holder of a press pass has access to the press rooms, other restricted areas of the White House, press briefings and conferences by the President and

(footnote continued on following page)

underlying this denial are fully set forth in the files of the Secret Service produced in the District Court. These records reveal that on October 6, 1964, [redacted] physically assaulted [redacted] press secretary to then Florida Governor Ferris Bryant. According to [redacted] had confronted him in a hallway of the State Capitol, accused him of being a liar and struck [redacted] on the jaw. [redacted] was charged with assault and battery, entered a plea of nolo contendere and was fined $200.

[redacted] was also reported to have assaulted [redacted] principal of Forth Worth High School at a public hearing before the Texas House Migrant Committee. [redacted] apparently left the state while those charges were pending, and accordingly has not been prosecuted for the indicent. The file also reflects that two persons, one of whom was Governor Bryant, stated that [redacted] was "mentally unbalanced." This information was incorporated into a memorandum from the Secret Service Agent in Charge to then

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b7C

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other senior officials, and when the President is travelling, to Air Force One or the accompanying press airplane or other special facilities. Accordingly the holder of a press pass is frequently in close personal contact with the President and other senior Executive Officials in situations in which the security is minimal.

press secretary [redacted]

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b7C

B. In 1971, plaintiff Thomas Forcade was the national political affairs correspondent for the Alternate Press Syndicate news service. On May 28th of that year, he made written application to Presidential Press Secretary Ziegler for a White House press pass. [3] Forcade was advised that his application would not be processed until he had become accredited by the Senate and House Periodical Press Galleries. He received Senate and House credentials in October, 1971. [4] On November 14, 1971, the Secret Service denied Forcade's application "for reasons of security." Although Forcade was not advised of the specific facts underlying the denial, the reasons underlying this denial are fully set forth in the files of the Secret Service produced in District Court. These files show that during the period from 1969 to 1974, he was known by at least three different names. On June 19, 1969, he was arrested under the alias of Gary Kenneth Goodson for possession of Lysergic Acid Diethylamide (LSD) in Phoenix, Arizona. The charge was subsequently dismissed on November 10, 1969, for insufficient evidence.

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3 / See note 2, supra.

4 / As the District Court noted (Slip Op. at 3), it is unclear from the present record whether defendants were ever advised of Forcade's receipt of these credentials; however, under customary procedures (see note 2, supra), the White House Press Office would not send the application to the Secret Service for a security determination until all other qualifications are met.

Three days later, he was arrested for burglary and desecration of the American flag, while attending an underground press convention in San Diego, California. These charges were subsequently dismissed. On May 30, 1970, Forcade struck Commissioner Larsen in the face with a pie during a hearing before the United States Commission on Obscenity and Pornography. No charges resulted from this incident.

Much of the material in Secret Service and FBI files relate to Forcade's participation in the Youth International Party (Yippies), the Zeitgeist International Party (Zippies), the Students for a Democratic Society (SDS) and the May Day Committee. The District Court, in summarizing these activities, noted (Slip Op. at 6-7):

> It appears from the record that Forcade was an active member and leader within the Yippie movement until May 26, 1972 when he was expelled by a committee of the membership. Until that time, the records state that he had advocated the use of violence at the Democratic National Convention in Miami, in 1972, and that he had stated on more than one occasion that the United States Capitol Building is "wide open for another bombing" similar to the celebrated restroom bombing that had earlier occurred. At the time of his expulsion from the Yippies, it was reported by an informant that he acted like "a wild man" and allegedly "carved up" a wall with scissors during the May 26 meeting. On May 30, 1972, Forcade and his followers attempted to physically penetrate the Yippie office in Miami, but were repulsed by a "wedge" formed by Abbe Hoffman and his followers. The FBI reports also list several other instances during this summer period arising

out of the Yippie/Zippie split which can only be characterized as pranks."

The records further disclose that in August 23, 1972, Forcade was again arrested. On this occasion he was stopped by police while driving a van; a search of the van revealed a five gallon can of gasoline together with what appeared to be detonation devices. He was thereafter indicted for possession of a destructive device in violation of the National Firearms Act (26 U.S.C. 5861(c); 5871). Following a two-day trial, the indictment was dismissed for insufficient evidence. On October 12, 1972, he was arrested in New York City for criminal trespass and harrassment under the alias of Dennis Stuckey. The record does not indicate the result of those charges. Thirteen days later, Forcade was charged with burglary. These charges were dismissed for failure of the complaining witness to respond to a subpoena. Finally, the FBI records disclose in a profile dated January 24, 1972, it was stated that ". . .the subject [Forcade] has allegedly stated that he intends to place a gun within a camera and gain access to the White House with the intention of shooting the President." (Slip Op. at 7).

C. In January 1972, plaintiffs' counsel wrote press secretary Ziegler, requesting the reason for the denials. In a letter dated February 11, 1972, John W. Warner, Assistant to the Director of the Secret Service responded that the

passes had been denied "for reasons of security." (Slip Op. at 3). A subsequent letter from Eugene T. Rossides, Assistant Secretary of the Treasury, dated June 26, 1972, informed plaintiffs' counsel of incidents which were considered in denying the passes. It states:

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b7C

> For [redacted] information, he has been arrested and fined for physical assault in the State of Florida. For Mr. Forcade's information, please refer him to the New York Times, May 14, 1970, p. 8 [this article reports Forcade's pie throwing incident discussed, supra, p. 6]

Thereafter, plaintiffs wrote Assistant Secretary Rossides in an effort to overturn their denials. In a letter dated October 2, 1972, Rossides declined to reverse the prior decisions reiterating that the press pass applications were denied "for reasons relating to the security of the President and the members of his immediate family." Id. at 4.

D. On June 22, 1973, plaintiffs filed their complaint, challenging the refusal of defendants to allow them access to White House press briefings and conferences. Specifically, they argued that their First Amendment right to gather information was abridged by the denial of press passes without standards or compelling justification. They also urged that procedural due process was violated by the failure of the Secret Service to provide a statement of reasons for the denial,

to allow them an opportunity to be heard or to apply formal guidelines for denying the application. Defendants moved to dismiss, contending that the First Amendment does not give plaintiffs a right of entry into the White House and that the procedures utilized in this case did not violate due process. In the alternative, the Government moved for summary judgment on the basis of the investigative files submitted to the court. Plaintiffs also filed a motion for summary judgment.

On July 7, 1976, the District Court granted plaintiffs' motion for summary judgment. In a memorandum opinion, the Court held that the denial of press passes implicates First Amendment rights by restricting newsgathering acitvities. Relying on Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) and its progeny, the Court found that plaintiffs could not be denied access required for their newsgathering activities except on the basis of formal guidelines. Accordingly, the Court required "standards narrowly and specifically drawn. . ." (Slip Op. at 16). The record contained a memorandum from Special Agent [redacted] entitled "Criteria for Denial of Entry - White House" defining certain criteria for denying entry but emphasizing that the decision is based on the judgment of the

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b7C

responsible Secret Service White House Security officer. [5] The Court indicated that these guidelines might well be too broad and vague to pass constitutional muster, but even if they could, there is no indication these were applied agency wide. Ibid. While the court felt that under Quaker Action, supra, it was required to undertake de novo review of the propriety of the denial of the press passes, it found that it was just as necessary for the Secret Service (1) to "articulate in as precise terms as possible the standards for issuance

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5/ The "Wong memorandum" indicates that the following criteria are among those which should be considered for barring entry to the White House:

> criminal, infamous, dishonest, immoral, notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, mental instability, propensity for violence as shown by previous conduct. Commission of any act of sabotage, espionage, treason, sedition, or attempts; preparation or conspiring with, or aiding and abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.
>
> Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist or revolutionist.
>
> Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of government of the U.S. by unconstitutional means.
>
> Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

and denial of White House press passes," and (2) issue a written decision applying those standards, specifying the facts supporting the decision and giving reasons for the denial. (Id. at 17).

The District Court concluded that plaintiffs had an interest in preventing interference with their profession cognizable under the Due Process Clause, and that the process due in these circumstances was the opportunity to rebut or explain evidence on which a denial is based. If an adequate opportunity to explain evidence in a particular case would require the disclosure of a confidential informant, either the informant must be disclosed, or the denial could not be based on this information (id. at 22).

The Court remanded the case to the Secret Service, requiring it, before January 3, 1977 (id. at 23).

> to devise and publicize narrow and specific standards for the issuance or denial of press pass application [sic] to consider plaintiffs' applications within the context of the newly devised standards, and to render a written decision specifying the grounds for denial, if that be the decision, after affording plaintiffs an adequate opportunity to rebut or explain any evidence or grounds upon which the agency bases its denial.

ARGUMENT

In this case, the threshold inquiry is whether the procedures utilized for the protection of the President of the United States and his official residence are open to judicial scrutiny. We

respectfully submit that they are not. As we shall discuss below, the circumstances presented in the instant case render these procedures inappropriate for judicial review. First, we argue that the protection of the President--and its attendant determinations of the best means to accomplish that end--are demonstrably not a judicial function. That function lies solely with the executive branch of the federal government. Next, we argue that predicting potential danger to the President involves factors not subject to a judicially manageable standard. As the Wong memorandum indicates (supra, note 5), there are a number of factors which may be considered in denying a particular individual access to the President, but the ultimate decision must rest with the agent in charge. It is his instinct and training, not formal guidelines, upon which often rest the security of the President.

Even if the plaintiffs' claims are judicially cognizable, however, they are in any event not entitled to relief. The reasonable limitations placed on the access to the President do not abridge plaintiffs' First Amendment rights. Correspondingly, in this case, as in all other cases involving the Due Process Clause of the Fifth Amendment, the initial inquiry is whether plaintiff has been deprived of "liberty" or "property". Only if such a deprivation has taken place is it necessary to ask what

process is due. As we argue in part III, plaintiffs are not deprived of liberty or property simply because they are denied access to the White House.

I. THE GRANT OR DENIAL OF WHITE HOUSE PRESS PASSES IS, IN THESE CIRCUMSTANCES, NON-JUSTICIABLE

Since the adoption of the Constitution, it has been recognized that some questions are beyond the power of the Courts to decide. "Questions in their nature political, or which are by the Constitution or laws, submitted to the executive, can never be made in this Court." Marbury v. Madison, 5 U.S. (1 Cranch) 137,170 (1802). When officers of the Executive Branch "act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable." Id. at 166.

In Massachussetts v. Mellon, 262 U.S. 447,488 (1923), the Court observed:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of interpreting and applying them in cases properly before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

See also, The Federalist, No. 48 at 332 (J. Cooke Ed., 1961) (Madison) and Statement of the Judges, 14 F.R.D. 335 (1953).

Thus, the Judiciary has declined historically to adjudicate cases in which there resides a "political" issue - that is an issue beyond the authority of the courts to decide. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court noted that "[t]he

nonjusticiability of a political question is primarily a function of the separation of powers." Id. at 210.

After a review of the "political question" cases, the Court established what may be taken as a guide for determination of whether a "political question" is present:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . .

369 U.S. at 217.

It is our position that each of the above quoted standards applies in this case, and that, as a result, the issues tendered herein are non-justiciable.

A. Presidential Protection Is Demonstrably Not A Judicial Function

Article II, Section 1 of the Constitution vests the "Executive power" in the President. Section 3 of Article II requires the President to "take care that the Laws be faithfully executed." Thus, the whole of the executive power of the United States is confided to the President under the Constitution. Protection of an officer of the United States is clearly a function of the Executive Branch. In re Neagle, 135 U.S. 1, 67 (1890) (protection of a Supreme Court Justice by a United States

Marshall). By statute Congress has lodged this protective function in the Secret Service. 18 U.S.C. 3056.

It is obvious that neither the Legislative nor the Judicial Branch is equipped to perform the duties required of those charged with the protection of our Chief Executive. "[T]he protective duties assigned to the agents under [18 U.S.C. 3056] require the instant exercise of judgment. . ." Galella v. Onassis, 487 F.2d 986, 993 (2d Cir. 1973).

It should require no more to demonstrate that the measures necessary to protect the President are matters peculiarly within the discretion of those charged by law with the duty of that protection. Even those charged with that duty may fail, regardless of their expertise; and when they fail, the loss to the nation is grievous. In the wake of such a tragedy, President Johnson appointed a National Commission to investigate the events of November 22, under the chairmanship of the late Chief Justice Earl Warren.

The Report of that Commission devoted Chapter VII to "The Protection of the President." It commenced that chapter by observing (at 425):

> In the 100 years since 1865 four Presidents of the United States have been assassinated--Abraham Lincoln, James A. Garfield, William McKinley, and

> John F. Kennedy. During this same period there were three other attacks on the life of a President, a President-elect, and a candidate for the Presidency, which narrowly failed: on Theodore Roosevelt while campaigning in October of 1912: on President-elect Franklin Delano Roosevelt, when visiting Miami on February 15, 1933; and on President Harry S. Truman on November 1, 1950, when his temporary residence, Blair House, was attacked by Puerto Rican Nationalists. One out of every five Presidents since 1865 has been assassinated; there have been attempts on the lives of one out of every three.6/

It thereafter stated with respect to intelligence functions relating to Presidential protection: "A basic element of Presidential protection is the identification and elimination of possible sources of danger to the President before the danger becomes actual" (id. at 429; emphasis added); but was critical of the then protective program of the Secret Service because it appeared "to relate principally to overt threats to harm the President or other specific manifestation of hostility." (Id. at 431). "The Commission has the impression that too much emphasis is placed...on the investigation of specific threats by individuals and not enough on dangers from other sources." (Id. at 458).

Thereafter the Commission expressed the need for "broader and more selective criteria" (id. at 461) and observed that the tentative criteria then under development by the Secret Service, "while a step in the right direction [still seemed to be] unduly restrictive in continuing to require some manifestation of

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6/ This recitation, of course, predates the assassination of Presidential Candidate Robert F. Kennedy, and the attempted assassinations of Governor Wallace and President Ford.

animus against a Government official." (Id. at 462).[7] On this point the Commission concluded: It is apparent that a good deal of further consideration and experimentation will be required before adequate criteria can be framed." (Id. at 463).

7/ In this regard, the Commission observed with respect to the threat posed by Lee Harvey Oswald that:

> As reflected in this testimony, the officials of the FBI believed that there was no data in its files which gave warning that Oswald was a source of danger to President Kennedy. While he had expressed hostility at times toward the State Department, the Marine Corps, and the FBI as agents of the Government, so far as the FBI knew he had not shown any potential for violence. Prior to November 22, 1963, no law enforcement agency had any information to connect Oswald with the attempted shooting of General Walker. It was against this background and consistent with the criteria followed by the FBI prior to November 22 that agents of the FBI in Dallas did not consider Oswald's presence in the Texas School Book Depository Building overlooking the motorcade route as a source of danger to the President and did not inform the Secret Service of his employment in the Depository Building.
>
> The Commission believes, however, that the FBI took an unduly restrictive view of its responsibilities in preventive intelligence work, prior to the assassination. The Commission appreciates the large volume of cases handled by the FBI (636,371 investigative matters during fiscal year 1963). There were no Secret Service criteria which specifically required the referral of Oswald's case to the Secret Service; nor was there any requirement to report the names of defectors. However, there was much material in the hands of the FBI about Oswald: the knowledge of his defection, his arrogance and hostility to the United States, his pro-Castro tendencies, his lies when interrogated by the FBI, his trip to Mexico where he was in contact with Soviet authorities, his presence in the School Book Depository job and its location

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The Secret Service, of course, does operate under a rational and identifiable standard for denial of press accreditation. The standard is the exclusion of all persons deemed to constitute a potential threat to the personal security of the President. There are, however, no published guidance criteria for the application of this standard in a particular case. This is because each case is individually assessed and each determination is based upon the protective experience and expertise of responsible Secret Service officials. Compare Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), cert denied, 397 U.S. 1039 (1970). This is understandable when it is remembered that a White House Press Pass operates as a pass to the White House generally. Holders of press passes operate under an "honor system." They are not always personally accompanied by the Secret Service while inside the White House grounds. 8/ Thus, the holder of a press pass is in an especially trusted

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> along the route of the motorcade. All this does seem to amount to enough to have induced an alert agency, such as the FBI, possessed of this information to list Oswald as a potential threat to the safety of the President. This conclusion may be tinged with hindsight, but it stated primarily to direct the thought of those responsible for the future safety of our Presidents to the need for a more imaginative and less narrow interpretation of their responsibilities. Id. at 443. (Emphasis supplied.)

8/ Affidavit of [redacted] para 5, Appendix, p. 8-9

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position insofar as the physical safety of the President is concerned. Obviously, the Secret Service cannot take the risk of granting such a pass to an individual of questionable background. Here the Congress has entrusted the matter of the President's safety to the complete discretion of the Secret Service. In the exercise of that discretion the Secret Service makes the most responsible judgment possible on the information available to it.

Congress has never attempted to provide guidance criteria, perhaps recognizing, as did the President's Commission, that "The protection of the President of the United States is an immensely difficult and complex task" (1964 Report, supra, at 426) and that ". . .no set of meaningful criteria will yield the names of all [persons who might potentially harm the President]" (id. at 463). When in 1971, Congress enacted legislation to govern ingress and egress to buildings and grounds which constitute the temporary residences of the President and the temporary offices of the President and his staff, 18 U.S.C. §1752, it did not attempt to provide any criteria as to who should be accorded such ingress and egress, see 1970 U.S. Code Cong. & Admin. News 5849, leaving the matter entirely to the discretion of the Secretary of the Treasury, who was authorized

> (1) to designate by regulations the buildings and grounds which constitute the temporary residences

> of the President and the temporary offices of the President and his staff, and (2) to prescribe regulations governing ingress and egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President is or will be temporarily visiting.

18 U.S.C. 1752(d)(1) and (2).

Under the 1971 Act the Secretary of the Treasury promulgated Regulations designating the temporary residences of the President and the temporary offices of the President and his staff and prescribing rules governing ingress or egress. 31 C.F.R Part 408, Section 408.3 of which provides:

> §408.3 Rules governing ingress or egress.
>
> (a) For the purposes of section 1752 of Title 18, United States Code, ingress or egress to or from the building or grounds designated in §408.2 and any posted, cordoned off, or otherwise restricted areas of a building or grounds where the President is or will be temporarily visiting is authorized only for the following persons:
>
> (1) Invitees: Persons invited by or having appointments with the President, the President's family, or members of the President's staff,
>
> (2) Members of the President's staff,
>
> (3) Military and Communications Personnel assigned to the Office of the President.
>
> (4) Federal, State and local law enforcement personnel engaged in the performance of their official duties and other persons, whose presence is necessary to provide services or protection for the premises or persons therein.
>
> (b) Authorized persons must possess and display identification documents issued by or satisfactory to the U.S. Secret Service.
>
> (c) Unauthorized entry is prohibited.

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As a matter of practical necessity the United States Secret Service has announced no formal guidance criteria for the denial of ingress or egress to the White House, including the denial of press accreditation, on grounds that an individual constitutes a potential threat to the physical safety of the President. The matter is not subject to a formalistic determination and must be made on the basis of the special expertise gained by the Secret Service since 1902 in the exercise of its "responsibility for the physical protection of the President and also for the preventive investigation of potential threats against the President." (1964 Report, supra, at 457).

The determination of the Congress that the Secret Service should have broad discretion[9] to control ingress and egress to Presidential residences is further support for our view that such protection is demonstrably a matter for the Executive Branch alone, and that where, as here, there is no denial of constitutional rights the judiciary should not interfere with the exercise of that Branch's discretion.

Recently, in a case strikingly similar to this, this Court found that the denial of accreditation to the Congressional

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9/ "If the Secretary has any discretion it seems to us it must include a discretion to prevent trouble when he reasonably foresees trouble. Without a preventive discretion he has no discretion of any realistic content." Worthy v. Herter, 270 F.2d 905, 912 (D.C. Cir. 1959).

periodical press galleries was nonjusticiable as the matter fell under the sole authority of Congress under the Speech and Debate Clause. Consumers Union of the United States, Inc. v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976).

The decision of that case, we believe, controls this. Access to the press galleries of Congress is within the sole discretion of the Congress, even where the denial of access is based on the content or point of view of the publication. Consumers Union, supra. It is hard to see how access to the White House, symbolized by a White House press pass can then be held not to be within the discretion of the Executive, the residence of whose Chief the White House is.

B. Predicting Potential Danger to the President Involves No Judicially Manageable Criteria

One of the criteria by which the presence of a "political" and, therefore, nonjusticiable, question is recognized is "a lack of judicially discoverable and manageable standards for resolving it." Baker v. Carr, supra, 369 U.S. at 217. The present case presents just such a problem.

What is at issue here is the criteria by which the Secret Service exercises its discretion in performing its protective

function. This involves a delicate weighing of many factors in order to arrive at a prediction, necessarily inexact, of the future behavior of a person under conditions which are unique.

It is difficult to determine, in the first place, what persons who may be dangerous to the President have in common--what, if anything marks them out from the general populace.[10/] In gathering the information on the persons who are to be in regular, frequent and unsupervised contact with the President, then, it is necessary to be as thorough as possible. Some small factor, when weighed in light of all the information available may be enough to tip the balance one way or the other. See, generally, Report of the National Commission, supra, p.18 n. 7.

The procedures and practices of the courts are not appropriate for this work. As the Supreme Court noted in a similar connection:

10/ The Secret Service, in Congressional testimony, reported that it had commissioned 16 studies, up to September, 1975, seeking to refine the criteria by which to make the judgment of dangerousness, to try to develop a "profile" of a prospective assassin. No such profile has been developed as a result of this effort. See, Review of Secret Service Protective Measures, Hearings before a Subcommittee of the Committee on Appropriations United States Senate, 94th Congress First Session. Hearings of September 30, 1975, pp. 11-18. Given the effort expended and the "frustrating" results achieved, it is not at all clear that such a profile can be developed.

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence service whose reports are not and ought not to be published to the world. It would be intolerable that courts without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences.

C & S. Airlines v. Waterman Corp., 333 U.S. 103, 111 (1948).

This is no less true in the field of protective security than in foreign affairs, particularly where the government's effort is to prevent danger to the President from arising by not permitting an opportunity for it to happen.

As we have said, the nature of the judgment to be made in cases of this type is predictive. It involves not only the history and character of the individual applicant but a judgment as to how that person may react to the unique atmosphere of the White House, a place like no other in the world.

Further, implicit in any grant or denial is an essentially subjective judgment of how much danger is too much-- where does the possibility of harm to the President become too great to risk. This is, and must be, a matter of professional judgment made by those who have the training and experience in protection of the President, as well as the day to day responsibility for his security.

Courts are simply not equipped for this task. Judges, and

juries, typically have neither the training nor the experience in these matters necessary for an informed judgment; nor do these judgments always lend themselves to precise articulation. Further, court proceedings are, and of right ought to be public. Disclosure of the measures used to protect the President risks making it that much easier for those so disposed to circumvent them.

Then, there is the inevitable question of evidence, and the related question of burden of proof. Are courts to determine who may be a danger? If so, how? Is hearsay evidence, which may be reliable, to be admitted? How does the government articulate the crucial judgment of how much danger is too much, and by what ascertainable standard does a court review it? Finally, is "reasonable cause" to fear danger enough, or too much? Or is "preponderance of the evidence" the proper standard? Perhaps, since the acts which may be engaged in are criminal, the courts will require proof beyond a reasonable doubt.

These are questions which courts need not, and should not face. They serve to illustrate, however, the lack of "standards" by which to guide a court to a proper decision in this area, and thus to show that exclusion from the White House on security grounds is a nonjusticiable question. Therefore, the District Court erred in not dismissing this action.

C. Presidential Protection Requires Policy Determinations Of A Kind Clearly For Executive Discretion Alone

A third basis recognized by the Supreme Court for a determination of the presence of a nonjusticiable political question is "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion, . . ." Baker v. Carr, supra, 369 U.S. at 217.

In the present case, the initial policy determination to be made is that adverted to above--a resolution of the question of how much exposure to danger is too much. This involves the balancing of a number of factors, none of which are appropriate for judicial determination. The District Court entered into this area, indicating by way of dicta that Plaintiff Forcade was shown to be a more substantial risk than Plaintiff [redacted] Slip Op. at 16-17. b6 b7C

In making the necessary determination, the factors to be considered include the degree of access to the President the applicant has; the nature and extent of the protective measures in place; and their probable efficacy in a whole range of possible situations. All of these matters, and many more not set forth, require the exercise of professional judgment by trained, experienced agents. Here, as in the areas referred to in Part B, supra, it is executive judgment that is necessary

and appropriate.

These decisions, as to the nature and extent of security precautions necessary for the protection of the President, involving as they do variable standards to meet varying situations "require the instant exercise of judgment and should be protected." Galella v. Onassis, supra, 481 F.2d at 993.

For the reasons set forth hereinabove, it is respectfully submitted that the questions presented in this litigation are for Executive determination under the Constitution, and therefore are not justiciable.

It is clear that the judiciary lacks jurisdiction to determine so-called "political" questions--matter committed to the other Branches of government. Thus, as this suit presents such questions,[11/] the District Court was without jurisdiction to hear and determine the matter. Accordingly, the District Court's judgment should be reversed and the case dismissed. See, Consumers Union of the United States, Inc. v. Periodical Correspondents Association, supra, 515 F. 2d at 1351.

11/ If this Court should conclude that the issue of justiciability was not comprehended within the issue of jurisdiction raised below, it is nonetheless timely here. Oklahoma v. Civil Service Commission, 330 U.S. 127, 134 (1947).

II. NO FIRST AMENDMENT RIGHTS WERE VIOLATED BY THE DENIAL OF WHITE HOUSE PRESS PASSES TO THE PLAINTIFFS.

The District Court, in ruling as it did, began with the premise that "[a]fter Branzburg [v. Hayes, 408 U.S. 665 (1972)] and Pell [v. Procunier, 417 U.S. 817 (1974)], it cannot legitimately be argued that newsgathering is unprotected by the First Amendment." Slip. Op. at 9-10.

While we do not take issue with this broad generalization, we submit that in the context of this civil action such a pronouncement cannot properly serve as the basic foundation for the legal reasoning which must govern the issuance or denial of White House press passes, for such a pronouncement presupposes a First Amendment factor where none in fact exists.

A. The Press Has No Right Of Access Greater Than That Of The General Public

In Branzburg, supra, the Supreme Court observed:

> We do not question the significance of free speech, press, or assembly to this country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated. But these cases involve . . . no prior restraint or restriction on what the press may publish and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek

> news from any source within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.
>
> * * *
>
> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.

408 U.S. at 681-82.

One "incidental burdening" of the press that the Supreme Court has recognized repeatedly is "the prohibition of unauthorized entry into the White House", even though the result of the prohibition is to reduce the opportunity of the public, or the press, to gather information "relevant to [an] opinion of the way the country is being run." Zemel v. Rusk, 381 U.S. 1, 16-17 (1965), quoted approvingly in Branzburg, supra, 408 U.S. at 684, n. 22, and Pell, supra, 417 U.S. at 834, n. 9.

As the Court observed in Pell:

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, supra, and that government cannot restrain the publication of news emanating from such sources. Cf. New York Times Co. v. United States [403 U.S. 713 (1971)]. It is quite another thing to suggest that the Constitution imposes upon government an affirmative duty to make available to journalists sources of information not available to members of the public generally."

417 U.S. at 834.

In Pell, and its companion case, Saxbe v. Washington Post Co., 417 U.S. 834 (1974), the Court approved restriction on reporters' access to prisons and their inmates, restrictions applicable to members of the public generally, as not violative of the First Amendment.

In the present case, we have a similar situation. Plaintiffs were denied access to the White House, demonstrably an area to which the public is not freely allowed access, because, in the judgment of those charged by law, 18 U.S.C. 3056; 3 U.S.C. 202, with the protection of the President and his family, and of the White House, they presented a risk of physical harm to the President. It cannot be contended that a member of the general public who, in the judgment of the Secret Service, threatens the safety of the President would have a right to a White House pass. Therefore, unless it is shown that some consideration touching on the plaintiffs' First Amendment rights (other than the asserted right to gather news) was behind the denial, plaintiffs' First Amendment rights have not been violated.

An analysis of the recent District Court cases involving press access supports this view. In Consumers Union of the United States, Inc. v. Periodical Correspondents Association, 365 F. Supp. 18 (D. D.C. 1973), rev'd as non-justiciable, 515 F. 2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976), the District Court found that exclusion of the reporters of Consumer Reports from the Periodical Press Gallery of Congress violated the First

Amendment. The District Court there stated that:

> [t]here should be no glossing over what this record discloses. Under a broad generalized congressional delegation authority has been given certain newsmen to prevent other newsmen from having access to news of vital consequence to the public. As a result, a group of established periodical correspondents have undertaken to implement arbitrary and unnecessary regulations with a view to excluding from news sources representatives of publications whose ownership or ideas they consider objectionable.

365 F. Supp. at 26. The District Court later stated ". . . there can be no justification for excluding those who advocate the special interests of consumers from the periodical galleries." Ibid. Earlier, the District Court observed "[a] free press is undermined if the access of certain reporters to facts relating to the public's business is limited merely because they advocate a particular viewpoint." Id. at 25. Thus, it is clear that the District Court found the denial of press credentials in Consumers Union to be violative of the First Amendment because it was rested on an impermissible basis -- the content or nature of the publication whose representative sought accreditation.

In Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973) the District Court, relying in part on the District Court's opinion in Consumers Union, supra, struck down a financial disclosure requirement for press access to the Alabama Legislature because of its tendency to "cause members of the press to limit their associational ties in order to avoid disclosure. 368 F. Supp. at 773 (emphasis supplied.). In Borrecca v. Fasi, 369 F. Supp 906

(D. Haw. 1974), the Court enjoined the exclusion of a reporter from mayoral press conferences where it was shown that the exclusion was based on the mayor's objection to the reporter's published stories critical of his administration, and the reporter's intention to go on criticizing the mayor.

In Quad-City Community News Service Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971), the Court enjoined the withholding from one newspaper access to information generally available to other news media. The Court there found that the Police Department, by use of unspecified criteria was "funneling information to the public through only certain representatives [of the press] who are considered more responsible because they 'co-operate' in presenting what the Department believes to be appropriate." 334 F. Supp. at 14. In Quad-City, further what was at issue was not the denial of press accreditation to a reporter, as is here, but rather denial of recognition of a newspaper and of accreditation to all of its reporters. Id. at 13.

In constrast to Quad City stands Watson v. Cronin, 384 F. Supp. 652 (D. Colo. 1974). In that case plaintiff, an editor of a monthly publication, was denied press credentials which would have allowed the holder access to the floor of the Colorado Legislature, to some police files; to pass police lines in natural disasters and like events, and to special automobile license tags and parking privileges. The denial was based on Mr. Watson's prior police record. The District Court denied

relief finding that "the Plaintiff has failed to demonstrate that he has been denied any constitutional rights by virtue of the denial to him of a press card." 384 F. Supp. at 661.

As those cases show, denial of a press pass per se does not violate any First Amendment right.

B. No Issue of Discrimination Because Of Protected Speech Is Present.

Nor can the plaintiffs or The Nation or the Alternate Press Syndicate, even were they parties to this action, show a denial of their asserted right to gather the news. As the uncontested affidavit of Thomas J. Kelley establishes, the only basis upon which a White House press pass is denied by the Secret Service is that the applicant pose a threat or potential threat to the President's physical safety. Kelley Aff., para. 6, Appendix, p. 9. Indeed, the Secret Service does not even pass upon applications until the White House Press Office has satisfied itself on the journalistic bona fides of the applicant. No showing has been made that the Secret Service harbors any objection to plaintiffs other than that occasioned by the danger they may pose to the President, and it has not been shown that either publication would have any difficulty securing accreditation of any other representative than the respective plaintiffs.

While Plaintiff [redacted] makes much of his appearance on the so called "enemies list", a point which the District Court also chose to highlight, Slip. Op. at 2, the significance of this

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is unclear. [redacted] application for a press pass to the White House was first denied on May 3, 1966, Slip. Op. at 3, many years before the appearance of an "enemies list." Accordingly, it is clear that [redacted] denial was not in any way related to or affected by that list.

Plaintiff Forcade does not appear on any such list, and nothing in the record or the Court's opinion discloses that he was denied a press pass based on his exercise of his First Amendment rights.

Thus, neither [redacted] nor Forcade has shown that he was denied a press pass due to his exercise of his rights under the First Amendment, and, therefore, that denial, itself, did not violate the First Amendment as to them.

In these circumstances no First Amendment violation is made out, and the District Court erred in finding such a violation.

III. DUE PROCESS OF LAW DOES NOT REQUIRE NOTICE AND A HEARING IN THIS CASE

In a recent case, the Supreme Court had occasion to review and comment on the developing law of procedural due process. After considering fully the cases, the Court, speaking through Mr. Justice Rehnquist, summarized the state of the law in this area:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alternation, officially removing the

> interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantee contained in the Due Process Clause . . .

Paul v. Davis, 424 U.S. 693, 711 (1976).[12]

In Board of Regents v. Roth, 408 U.S. 564, 569 (1972), the Court observed:

> The requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interest protected by procedural due process is not infinite. 13/

As we have shown, in part II, supra, no deprivation of First Amendment rights resulted from the denial of the plaintiffs' application for press passes. Thus, their claim of a deprivation of due process must rest on an independent ground. Roth, supra, and Paul, supra, recognized that due process protections would also apply when liberty or property interests were infringed by government action. We will show, infra, that no deprivation of liberty or property was here involved.

12/ See also Meachum v. Fano, ___ U.S. ___, 44 U.S.L.W. 5053, (Decided June 25, 1976), where the Court "reject[ed] at the outset the notion that any grievous loss visited upon a person by a State is sufficient to invoke the procedural protections of the Due Process Clause." Id. at 5056 (emphasis in the original).

13/ For the present purposes, the due process clauses of the Fifth and Fourteenth Amendments may be taken as co-extensive. Cf. Bowles v. Wilhingham, 321 U.S. 503, 518 (1944), and cases these cited, Furman v. Georgia, 408 U.S. 238, 419 (1972) (Powell, J. Dissenting); Palmore v. United States, 411 U.S. 389, 410 (1973).

A. Plaintiffs Were Not Denied "Liberty" When They Were Denied White House Press Passes.

In the present case, the District Court held that:

> [T]he right to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" concept of the Due Process clause. Greene v. McElroy, 360 U.S. 474, 492 (1959); Shaw v. Hospital Authority of Cobb County, 507 F. 2d 625, 628 (5th Cir. 1975); Gilmour v. New York State Racing and Wagering Board, 405 F. Supp. 458, 459-60 (S.D. N.Y. 1975). It is immaterial whether the governmental interference amounts to a total preclusion from a chosen profession or only a partial interference with the free exercise of that profession.

Slip. Op. at 19.

The Supreme Court, on the contrary, has indicated recently, that some "interference with the free exercise of [a] profession" does not deprive one of "liberty" within the meaning of the Due Process clause. Roth, supra. In Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), the Supreme Court concluded that due proces was not denied an employee of a private contractor who was summarily denied entry into the Naval Gun Factory for reasons of security. The Court there observed that the interest involved in that case

> [m]ost assuredly was not the right to follow a chosen trade or profession. [citing cases] [The employee] remained entirely free to obtain employment [in her chosen trade] or to get any other job either with MCM or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation.

367 U.S. at 895-96.

Cafeteria Workers stands for the principle that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." Roth, supra, 408 U.S. at 575. This is in sharp contrast to the case presented by Greene v. McElroy, supra, where the interference by the government with the appellant's profession amounted to a total exclusion from professional employment.

The present case falls within the rule of Cafeteria Workers and Roth, recently reaffirmed in Paul v. Davis, supra, that governmental action imposing only a partial restriction on one's exercise of his chosen profession is not, for due process purposes, a denial of liberty. Here, plaintiffs were not denied the "right to practice their profession." The record is clear, in fact, that plaintiffs subsequent to the denial of their press pass applications have continued to practice their profession, and their ability to do so has been only marginally affected, if at all. Plaintiffs have continued to report from Washington, and to express their views on the conduct of the Government. The conclusion that the denial of their press pass applications is "an 'increasing impediment'" to their work, as found by the District Court, Slip. Op. at 19, cannot, in view of the Supreme Court's rulings in Cafeteria Workers, Roth and Paul, be held to be a denial of liberty sufficient to trigger the due process protections claimed herein.

Therefore, plaintiffs have not been denied liberty without due process of law, and the District Court erred in finding to the contrary. Absent such a denial there is no basis in law for the Order entered herein, and it should be vacated.

B. Nor Have Plaintiffs Been Denied "Property" Without Due Process Of Law.

It is familiar law that a denial of "property" might give rise to due process protections. See, e.g., Roth, supra, 408 U.S. at 576-578. However the Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the constitution. Rather they are created, and their dimensions are defined by existing rules or understanding that stem from an independant source such as state law - rules or understandings that support claims of entitlement to those benefits.

408 U.S. at 577.

In the present case, plaintiffs have shown no "existing rules or understandings" stemming from a source other than the Constitution which would entitle them to entry into the White House. Rather, the White House, is, by existing "understandings" a place to which one can gain entry only by invitation; or with a pass. And, under "existing rules or understanding" such passes are issued only after the Secret Service has determined that the

applicant poses no threat to the physical safety of the President or his family. It is here, of course, that any "property" argument must fail, for the denials were made under "existing rules or understandings."

Therefore plaintiffs had no property interest sufficient to require that "due process" be afforded before denial of their applications.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the District Court's Order granting the plaintiffs' motion for summary judgment and requiring the defendants to devise and publicize "standards" for the issuance of a press pass, and to reconsider their applications thereunder; and to render a written decision thereon should be reversed; and this matter should be dismissed.

Respectfully submitted,

RICHARD L. THORNBURGH
Assistant Attorney General

[redacted] b6 b7C

Attorneys, Department of Justice
Washington, D. C. 20530

Attorneys for Defendants-Appellants

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1945

THOMAS FORCADE, et al.,

Plaintiffs-Appellees,

v.

H. STUART KNIGHT, Director
United States Secret Service, et al.,

Defendants-Appellants

Appeal from the United States
District Court for the District of Columbia

APPELLANTS' APPENDIX

RICHARD L. THORNBURGH
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[redacted]

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Justice
Washington, D.C. 20530

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100-469538-232

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TABLE OF CONTENTS OF APPENDIX

CIVIL DOCKET

United States District Court for the District of Columbia

FORCADE, ET AL vs. ROWLEY, et al C. A. No. 1059-73 Preceding Page XSupplemental Page XXX

DATE	PROCEEDINGS
	PARTIES ATTORNEYS
	American Civil Liberties Union 410 First St. S. E.
	THOMAS FORCADE [redacted] 20003
	~~ALL INFORMATION CONTAINED~~ HEREIN IS UNCLASSIFIED DATE 06-28-2010 BY 60322/UC/LRP/STP/ETG
	vs. [redacted] b6 b7C
	1. JAMES J. ROWLEY, Director United States Secret Service Dept. of Justice 20530 739-3032
	2. JOHN W. WARNER, JR. Assistant to the Director do
	3. GEORGE P. SHULTZ, Secretary of the Treasury do
	4. RONALD L. ZIEGLER, Press Secretary to the President do

01

CIVIL DOCKET

United States District Court for the District of Columbia

PARTIES	ATTORNEYS	NUMBER
		1259-73
THOMAS FORCADE, et al	See preceding page	
		ACTION FOR
		DECLARATORY INJUNCTIVE, etc
vs.		
l. JAMES J. ROWLEY, et al		

SEE PRECEDING PAGE FOR COMPLETE — Jury demand ☐

DATE	ACCOUNT CAPTION	REC'D	DISB'D	DATE	ACCOUNT	REC'D	DISB'D
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an 22	[redacted]	10 00					b6 b7C
an 22	U. S. TREASURY		10 00				

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CIVIL DOCKET

United States District Court for the District of Columbia

#3 serv 6-25
#4 serv 6-25

1973 Date		Proceedings
Jun	22	Complaint, appearance Exhibits A thru I , filed 2 6-25
Jun	22	Summons, Copies (5) and Copies (5) of Complaint issued Atty Gen & Da " 6-25
July	5	REASSIGNMENT of case from Judge Curran, to Judge Jones, on 6/29/73.
Aug	24	ANSWER of defts. to complaint. c/m 8-24 app of [redacted]
Aug	24	CALENDARED. CD/N
Oct	26	FIRST interrogatories of pltfs. to defts. c/m 10-24
Nov	8	Request of pltf. for production of documents. c/m 11-5
Nov	21	STIPULATION extending the time in which the defts may answer pltfs' inter[illegible] to and including December 13, 1973. (N) (Approved) (fiat) [redacted]
Dec	13	RESPONSE of deft. to plaintiffs. first interrogatories; c/m 12-13-73
Dec	1[illegible]	OBJECTIONS of defts. to certain of pltff. first interrogatories; c/m 12-1[illegible] [redacted]
Dec	17	RESPONSE of deft./to pltfs. first interrogatories; c/m 12-17-73.
1974		
Jan	3	STIPULATION extending the time in which the defts. may respond to pltfs. request for production of documents to and including 1-10-74, approved (FIAT)(N) [redacted]
Jan	10	APPEARANCE of [redacted] as counsel for defts. CAL/N
Jan	10	APPEARANCE of [redacted] as counsel for defts. CAL/N
Jan	10	STATUS HEARING. (Rep: [redacted] [redacted]
[illegible]		[illegible] for production of [illegible] [illegible]
		(SEE NEXT PAGE)

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03

CIVIL DOCKET

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United States District Court for the District of Columbia

HOWARD FORCADE, et al vs. H. STUART KNIGHT, et al C. A. No. 1258-73 Supplemental Page No. 2

1974 Date		Proceedings
Jul	19	REPLY memorandum by pltfs. and opposition to defts. motion to dismiss, o in the alternative for summary judgment, and defts. in camera sub- mission; c/m 7-12-74; table of contents; table of authorities.
1975		
Jan	10	MOTION of deft. for summary judgment argued in part and deft. given unt 1-30-75 to assert any executive privilege to be claimed. (Rep: [redacted] [redacted]
Jan	17	ORDER directing defts. to determine by 1-30-75 whether to make a claim executive privilege with respect to any documents proffered in camer exhibit and that defts. shall turn over to pltfs. any documents not claimed by executive privilege or which is not sustained by the Cour (N)(Signed 1-16-75) [redacted]
Jan	30	MOTION by defts. for protective order; c/m 1-30.
Jan	30	NOTICE by defts. of in camera submission of sealed exhibit; affidavit o [redacted] c/m 1-30.
Jan	31	NOTICE by defts. of in camera submission; affidavit and claim of privil of the Acting Attorney General of the United States, [redacted] [redacted] c/m 1-30.
Jan	31	DOCUMENTS mailed to pltfs. by defts. on 1-31-75 in accordance with the Court's Order of January 16, 1975; c/m 1-31.
Feb	18	ORDER granting motion of defts. for a protective order; restricting access to certain material in the memorandum of Special Agent [redacted] [redacted] to pltf. [redacted] and his counsel. (See Order for details) (N)(Signed 2-14-75) [redacted]
		Court copy.

(SEE NEXT PAGE)

04

FBI—SS—3-5-74—[illegible]

CIVIL DOCKET

United States District Court for the District of Columbia

[illegible]OMAS FORCADE, et al vs. JAMES J. ROWLEY, ET AL C. A. No. 1253-73 Supplemental Page No. 1

b6
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DATE		PROCEEDINGS
74		
Apr	15	MOTION by pltfs. for summary judgment, or in the alternative, for an Order compelling discovery; statement; affidavit of Thomas K. Forcade; exhibit A &B; affidavit of [redacted] exhibit A, B, B(2), B(3), B(4), B(5), exhibit C; affidavit of [redacted] affidavit of [redacted]; affidavit of [redacted] affidavit of [redacted] affidavit of [redacted] brief; c/m 4-11-74.
Apr	24	STIPULATION extending the time in which the defts. may respond to pltfs. motion for summary judgment or in the alternative for an Order compelling discovery to May 22, 1974, approved. (FIAT)(N) [redacted]
May	22	MOTION by defts. for enlargement of time; P&A's; c/m 5-22-74.
Jun	6	ORDER granting motion of defts. for an extension of time to respond to pltfs. motion for summary judgment or in the alternative to compel discovery to [illegible] 21, 1974. ([illegible]) [redacted]
Jun	21	NOTICE by defts. of in camera submission; c/m 6-21-74.
Jun	21	MOTION by defts. to dismiss or for judgment on the pleadings for lack of jurisdiction or, in the alternative, for summary judgment; affidavit of Thomas J. Kelley; statement; P&A's; c/m 6-21-74.
Jun	21	MOTION by defts. for a stay of discovery pending disposition of defts. pending motion to dismiss or for judgment; P&A's; c/m 6-21-74.
Jun	27	AFFIDAVIT of Thomas J. Kelley ([illegible]); c/m 6-27-74.

(OVER)

CIVIL DOCKET

United States District Court for the District of Columbia

CHAS. FORCADE, et al vs. JAMES J. ROWLEY, et al C. A. No. 1250-73 Supplemental Page No. 3

975 Date		Proceedings
Mar	7	MOTION by pltfs. for access to in camera material; P&A's; exhibit A,B; c/m 3-5.
Mar	7	SUPPLEMENTAL interrogatories by pltfs. to H. Stewart Knight, John W. Warner, Jr., and William E. Simon; c/m 3-5-75.
Mar	10	SUPPLEMENTAL memorandum by pltfs. in support of motion in the alternative to compel discovery; c/m 3-6.
Mar	24	OPPOSITION by defts. to pltfs. motion for access to in camera material; exhibit A; c/m 3-24.
Apr	4	OBJECTIONS by defts. to certain of pltfs. supplemental interrogatories; c/m 4-4.
Apr	4	RESPONSE by defts. to pltfs. supplemental interrogatories; c/m 4-4. b6 b7C
Oct	14	STATUS CALL. (Rep: [redacted])
Oct	15	REPORTER'S notes of portion of proceedings of 10-14-75 sealed and placed in safe in Room 1516.
976		
Apr	7	FURTHER memorandum by defts. in opposition to pltfs. motion for access to in camera material; exhibit A; c/m 4-6.
May	7	MEMORANDUM AND ORDER filed 5-6-76 denying motion of pltfs. for access to certain in camera materials. (M)
Jul	8	MEMORANDUM AND ORDER filed 7-7-76 denying motion of defts. to dismiss or for summary judgment; granting motion of pltfs. for summary judgment; directing defts. to [illegible] within 180 days of this or [illegible] to press pltfs. applications within the context of the newly devised standards and render a written decision specifying the grounds and outlining the evidence upon which they base the denial [illegible] (M)

06

CIVIL DOCKET

United States District Court for the District of Columbia

Torrade et al vs. Rowley, et al. C. A No. 1258-73 Supplemental Page No. 2

Date		Proceedings
1976		
Sept	7	NOTICE of Appeal by defts. from order of July 7, 1976. Copies sent to [redacted] No Fee.
Sept	7	APPEARANCE OF [redacted] as counsel for the defts. b6 b7C
Oct	18	RECORD on appeal delivered to USCA; receipt acknowledged. (76-1945)

07

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS FORCADE
and [redacted]

Plaintiffs,

v.

H. STUART KNIGHT, et al.,

Defendants

Civil Action No. 1258-73

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AFFIDAVIT OF THOMAS J. KELLEY

THOMAS J. KELLEY being duly sworn deposes and says:

1. I am employed by the United States Secret Service and presently serve in the position of Assistant Director, Office of Protective Intelligence, and have held said position for 7 (seven) years.

2. The Office of Protective Intelligence is charged with the duty of planning, directing and coordinating intelligence gathering activities of information affecting the security of the President and his family, the Vice President, and others authorized protection by the Secret Service. The Office of Protective Intelligence was established as a result of a recommendation of the Warren Commission for the purpose of widening the perspective of the United States Secret Service in collecting, evaluating, storing and disseminating information that may affect the security of the protectees of the Secret Service.

3. On May 3, 1966, [redacted] application for access to the White House complex to attend White House press briefings was denied for reasons of security; and his re-application was again denied on or about January 19, 1972.

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4. On October 6, 1971, Thomas King Forcade's application for access to the White House complex to attend White House press briefings was denied for reasons of security.

5. The Secret Service is charged by law with protecting the person of the President of the United States and the WhiteHouse grounds and this includes providing a secure environment. Access to the White House grounds has been controlled by the Secret Service since it was authorized to protect the President. The Secret Service has summarily excluded all persons from the White House grounds who may constitute a threat or potential threat to the President.

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Admission to the White House grounds via a press pass entails a certain amount of discipline, and willingness to accept instruction on the part of the applicant because there is not, and cannot be, constant supervision and surveillance of each holder of a press pass. Holders of a press pass have certain privileges which bring them in close proximity to the President, not only in the actual press conferences where there is virtual face to face confrontation, but in traveling with the President. They may on occasion enter the office of the President, the Cabinet Room, and other sensitive areas of the White House complex. Therefore, holders of the White House press pass must be persons who present no risk or potential risk to the physical security of the President.

6. The U. S. Secret Service denies access to the White House grounds only on the basis of threat or potential threat to the physical safety of the President; there is no other purpose for the objection to the granting of a press pass by the Secret Service other than this protective function.

7. The collection, assessment and evaluation of intelligence relative to the protection of the President is a complex matter. It requires a great deal of experience dealing with the specific area. It is not suitable to a formalistic approach. Determining whether or not an individual, based on his background and history, may be a potential threat to the President, is a decision based on many variables that can only be made by seasoned investigators familiar with the subject and his history. The job of predicting future conduct is at best difficult; therefore any individual whose history demonstrates a tendency to violate the law, a tendency towards violence or assault, as well as other unpredictable behavior and potential dangerousness, must be of paramount consideration to the Secret Service in its protective function. The Secret Service cannot, out of an abundance of caution, dismiss or ignore any of these type acts in any individual's past history, when it is considering access to the White House grounds, especially in view of the aforementioned access bestowed upon holders of White House press passes.

8. [redacted] and Thomas Forcade were denied access to the files of the Secret Service under the Freedom of Information Act, Title 5, section 552 of the

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United States Code, on June 26, 1972, in a letter from the former Assistant Secretary of the Treasury Eugene Rossides to Eugene F. DuBose, Jr. of the American Civil Liberties Union. In that denial, Mr. Rossides stated that [redacted] had been arrested and fined for physical assault in the State of Florida". He also referred Mr. Forcade to the New York Times, May 14, 1970, page 8, where news coverage of a hearing of the Commission on Obscenity and Pornography in Washington, D. C., revealed that Mr. Forcade, during a verbal exchange, threw an object at the Chairman of the Commission, Professor Otto Larsen.

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9. The foregoing information related by Mr. Rossides is in the files of the Secret Service. As regards both [redacted] and Mr. Forcade there is other information equally serious and in part obtained through confidential means, which was also the basis for the denials of access to the White House grounds. This information from the protective intelligence and investigative files of the United States Secret Service is submitted herewith as a sealed in camera exhibit for the Court's ex parte consideration. Also enclosed in this exhibit is information from the intelligence and investigative files of the Secret Service regarding one of the plaintiffs, received subsequent to the denial for access to the White House grounds.

Thomas J. Kelley

THOMAS J. KELLEY

Subscribed and sworn before me this 26th day of June, 1974.

Edith J. Roberts
Notary Public
My Comm. Expires: 9/30/74

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS K. FORCADE, et al.,)
)
Plaintiffs)
)
v.) Civil Action No. 73-1258
)
H. STUART KNIGHT, et al.,)
)
Defendants)

MEMORANDUM

Plaintiffs, Thomas Forcade and [redacted] bring this action challenging the refusal of defendants to admit them to White House press briefings and conferences. In their motion for summary judgment, they argue that their First Amendment right to gather information has been abridged by the discriminatory denial of press passes without apparent standards or compelling justification. They also argue that their Fifth Amendment procedural due process rights have been violated by the failure of the Secret Service to inform them of the reasons for their exclusion, to allow them an opportunity to be heard, or to apply identifiable standards in denying their applications for press passes. They further argue that they are entitled to a de novo determination in this Court of the propriety of defendants' action. Plaintiffs ask the Court to declare unlawful defendants' refusal to grant them press passes and to enjoin the continuing refusal to grant accreditation to the plaintiffs. 1/

Defendants move to dismiss, arguing that the First Amendment does not give plaintiffs a right of entry into the

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1/ When plaintiffs filed their motion for summary judgment on April 15, 1974, they requested that the Court compel defendants to produce certain requested documents if their motion was denied. Eventually, on January 31, 1975, defendants produced the entire file relating to denial of plaintiffs' applications, with a small number of deletions. Defendants then requested the Court to consider ex parte the deleted portions in determining the pending motions. Plaintiffs objected and moved for access to the deleted portions. On May 6, 1976, after representations by counsel that defendants would rely solely on the record made available to plaintiffs, the Court denied plaintiffs' motion for access without prejudice to its reassertion if plaintiffs be so advised. To this date, plaintiffs have not reasserted their motion for access.

11

White House and that summary procedures do not violate plaintiffs' due process rights. In the alternative, defendants contend that the Court should grant them summary judgment based upon the protective and investigative files submitted to the Court.[2/]

II. PARTIES

Thomas Forcade is a reporter in the Alternate Press Syndicate (APS) which is an international news service that represents more than 200 subscribing newspapers. According to the complair he has covered national political affairs since 1968, and, since 1971, has been APS's national affairs correspondent in Washington. He has been a member of the House and Senate Press Galleries since October, 1971, holds press credentials issued by the Washington, D.C. police department, and was accredited as a national reporter at the 1972 Democratic and Republican National Conventions. On January 20, 1972, plaintiff Forcade covered the President's State of the Union message from the press gallery of the House of Representatives.

Since 1965, [redacted] has been Washington correspondent for The Nation. He has been a member of the House and Senate Periodical Press Galleries since 1966. [redacted] has written more than 66 articles and numerous signed and unsigned editorials for The Nation and other magazines and newspapers; he has also written six books, two of which were listed on the New York Times list of best books of the year. It was also disclosed after this action was filed that [redacted] was on the original White House "enemies list." See Exhibit C to Pls' Motion for Summary Judgment.

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The original defendants in this action were James J. Rowley, Director of the Secret Service, John W. Warner, Assistant to the Director of the Secret Service, George P. Shultz, Secretary of the Treasury, and Ronald L. Ziegler, Press Secretary to the President. Pursuant to Rule 25(d), F.R.C.P., H. Stuart Knight, present Director of the Secret Service, William E. Simon, present Secretary of the Treasury, and Ronald H. Nessen, present presidential

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2/ See note 1, supra.

press secretary, are automatically substituted for the named defendants.

III. FACTS

On May 28, 1971, plaintiff Forcade made written application to defendant Ziegler for a pass to attend White House press conferences and briefings. Plaintiff Forcade was informed in August 1971 that his application for a White House press pass wou not be processed until he had become a member of the Senate and House Periodical Press Galleries. He received the Senate and House credentials in October 1971. It is not clear from the pleading or the memoranda whether the receipt of these credentials was ever made known to the defendants.

After obtaining credentials for membership in the Periodical Press Galleries of the Senate and House of Representative: plaintiff [redacted] on May 3, 1966, was denied White House press credentials by the Secret Service. He has been told that his denial is continuing in effect.

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Neither plaintiff has ever received more than a minimal summary explanation for the denial of their applications. In a letter dated January 6, 1972, counsel for plaintiffs asked defendant Ziegler to explain if and why the plaintiffs had been denied press passes. Exhibit A to Complaint. In a letter dated February 11, 1972, defendant Warner, Assistant to the Director of the Secret Service, responded that plaintiff [redacted] had been denied accreditation on May 3, 1966, and that plaintiff Forcade had been denied accreditation on November 14, 1971. Exhibit B to Complaint. The only explanation given was that the passes were denied "for reasons of security." On June 26, 1972, Eugene T. Rossides, Assistant Secretary of the Treasury, in a letter to plaintiffs' counsel, referred to two incidents that impliedly influenced the decision to deny the plaintiffs' applications for press passes:

> For [redacted] information, he has been arrested and fined for physical assault in the State of Florida. For Mr. Forcade's information, please refer him to the New York Times, May 14, 1970, p. 8.

Exhibit F to Complaint.

After failing to obtain documents explaining the denial of the press pass applications, plaintiffs appealed, in a letter dated September 17, 1972, to Assistant Treasury Secretary Rossides to overturn the denials. Exhibit H to Complaint. On October 2, 1972, Rossides refused to reverse the previous decisions and reiterated that the press pass applications were denied "for reasons relating to the security of the President and the members of his immediate family." Exhibit I to Complaint.

Defendants agree that plaintiffs met all requirements for the issuance of press accreditation except for a security clearance. Def's Statement of Material Facts ¶ 2. They also admit that plaintiffs' applications were summarily denied, that there were no written administrative regulations in effect at the time the requests by plaintiffs for press passes were denied, and that no similar regulations are in effect now. See Answer, ¶¶ 12, 20.

IV. DOCUMENTS PRODUCED JANUARY 31, 1975

The FBI and Secret Service files produced by defendants (see note 1, supra) do not change the fundamental issues before the Court; however, they do provide substantial and helpful background to a determination of the issues. Deleted material, which is not included in the ensuing discussion, occurs only in the files applicable to plaintiff Forcade.

A. Sherrill

The decision to deny [redacted] application for a press pass was based upon two incidents, according to a May 3, 1966 memorandum addressed to Bill Moyers (then the presidential press secretary) from Special Agent in Charge Ronald C. Towns. The more serious incident involved an assault upon [redacted] press secretary to Florida Governor Ferris Bryant, on October 6, 1964. According to the various reports of the Treasury Department Intelligence Division, [redacted] assaulted [redacted] without provocation in the hallway of the Florida State Capitol Building. Evans speculated that the reason for the assault was a response he had written to an earlier article by [redacted] in June 1964, in which [redacted] had

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stated that the [redacted] article was substantially incorrect. According to [redacted] accused [redacted] of calling him a liar when he saw him in the hallway, and as the confrontation heated, [redacted] struck [redacted] on the jaw. [redacted] was charged with assault and battery, he pleaded nolo contendere, and was fined $200. The Secret Service interviewed [redacted] Governor Bryant, the Tallahassee Sheriff's Department, but never, by written or oral communication, contacted [redacted] to ascertain his version of the offense.

The second incident occurred in October 1962, when [redacted] allegedly assaulted [redacted] Fort Worth High School, at a public hearing before the Texas House Migrant Committee. The plaintiff apparently skipped bond on charges arising out of the incident, has never been prosecuted for the incident, but will be if he ever returns to the State of Texas. The information regarding this assault was provided by [redacted] three newspaper articles, and a telegram addressed to [redacted] from the editor of a Lubbock, Texas newspaper. No other persons were contacted or interviewed to substantiate the incident, nor was plaintiff [redacted] ever requested to submit an explanation of the incident.

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Finally, at least twice in the files, charges that [redacted] was "mentally unbalanced" were made, once by Governor Bryant and once in a memorandum from one "eed" to Special Agent in Charge Wong. Neither charge is substantiated by any facts, analysis, medical opinion, or explanation. Plaintiff [redacted] was never requested to comment upon the accusations.

B. Forcade

Unlike [redacted] case, the reasons for denial of Forcade's application are nowhere specifically set forth. It is therefore difficult to determine which incidents in the rather voluminous records applicable to Forcade were used as a basis to deny the application.

Forcade has been known by at least three different names during the period from 1969 to 1974, which the FBI and Secret Service files encompass. His first arrest during that period was under the name Gary Kenneth Goodson on June 19, 1969 for

possession of LSD in Phoenix, Arizona. That charge was dismissed on November 10, 1969, for insufficient evidence. On November 13, 1969, Forcade again was arrested in San Diego for burglary and desecration of the American flag while attending a convention of underground press persons. Although the date is unclear, the charges were shortly thereafter dropped by the San Diego authorities. There is also an accusation that at the same convention Forcade became angered at one of the participants and hurled a glass of water at him. No charges evolved from that incident.

On May 13, 1970, at a hearing before the United States Commission on Obscenity and Pornography, when asked about his feelings about an issue, Forcade hurled a pie at Commissioner Otto N. Larson. He then read a prepared 1,000 word statement protesting the Commission's existence. No charges resulted from the incident.

During the demonstrations in Washington, D. C. in the summer of 1971, Forcade publicly stated that he planned to hold a "massive marijuana smoke-in" at the Washington Monument on July 4, 1971. No action was taken against Forcade for the statements and it does not appear in the record whether the "smoke-in" ever occurred.

The majority of the records produced concern Forcade's relationship with and activities in the Youth International Party (popularly known as the Yippies), the spin-off Zeitgeist International Party (popularly known as the Zippies), the Students for a Democratic Society (SDS), and the May Day Committee. It appears from the record that Forcade was an active member and leader within the Yippie movement until May 26, 1972 when he was expelled by a committee of the membership. Until that time, the records state that he had advocated the use of violence at the Democratic National Convention in Miami in 1972, and that he had stated on more than one occasion that the United States Capitol Building is "wide open for another bombing" similar to the celebrated restroom bombing that had earlier occurred. At the time of his expulsion from the Yippies, it was reported by an informant that he acted like "a wild man" and allegedly "carved up" a wall with scissors during the May 26 meeting. On May 30, 1972, Forcade and his followers attempted to physically penetrate the Yippie office in Miami, but were repulsed by a "wedge" formed by

Abbe Hoffman and his followers. The FBI reports also list several other instances during this summer period arising out of the Yippie/Zippie split which can only be characterized as pranks.

Three other criminal violations were allegedly committed by Forcade during the remainder of 1972. On August 23, 1972, Forca was arrested after a van which he was driving was stopped by police There were approximately 14 other persons in the van at the time, and the police found a five-gallon can of gasoline along with wax-and-wick devices which allegedly were incendiary devices for the gasoline can. On February 8, 1973, Forcade was indicted for violations of the National Firearms Act, 26 U.S.C. §§ 5861(c), 5871 arising out of the August 23, 1972 arrest. On March 29, 1973, the charges were dismissed by Judge Fay of the United States District Court for the Southern District of Florida after a two day trial for insufficient evidence. Second, on October 25, 1972, charges brought against Forcade for allegedly burglarizing a ten-foot high portrait of President Johnson were dismissed for failure of the complaining witness, the Democratic National Committee, to respond to a subpoena. Third, on October 12, 1972, Forcade was arrested in New York City for criminal trespass and harassment under the alias of Dennis Stuckey. The record does not show the disposition of those charges. It should be noted that the final decision of the Secret Service to deny Forcade's application preceded most of the reports concerning the National Firearms Act charge, as well as the criminal trespass charge.

The most serious allegation, which was unintentionally disclosed by defendants when the files were produced pursuant to the Court's January, 1975 Order, is contained in one of the FBI profiles of Forcade. That profile, dated January 24, 1972, under the heading "Education and Training," states:

> This category is not known at this time. It is noted that the subject has allegedly stated that he intends to place a gun within a camera and gain access to the White House with the intentions of shooting the President.

Finally, throughout Forcade's file the following warning appears several times:

> ALL INDIVIDUALS INVOLVED IN NEW LEFT EXTREMIST ACTIVITY SHOULD BE CONSIDERED DANGEROUS BECAUSE OF THEIR KNOWN ADVOCACY AND USE OF EXPLOSIVES, REPORTED ACQUISITION OF FIREARMS AND INCENDIARY DEVICES AND KNOWN PROPENSITY FOR VIOLENCE.

Nowhere in the file is there evidence that Forcade was requested to respond to any of the charges, or to explain his version of the events alleged. Nor is there any explanation of the events which the Secret Service considered sufficiently serious to warrant denial of plaintiff's application.

C. Wong Memorandum

Also included in the file relating to Forcade is a memorandum from Special Agent in Charge Wong (Technical Security Division) to "AD Kelley" (Protective Intelligence), entitled "Criteria for Denial of Entry --- White House." The memorandum states that "pre-entry investigations" are to be made "to determine whether the admission is clearly consistent with the interests of national security." It also outlines "some of the criteria" for barring entry to the White House:

> Criminal, infamous, dishonest, immoral, notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, mental instability, propensity for violence as shown by previous conduct, commission of any act of sabotage, espionage, treason, sedition, or attempts; preparation or conspiring with, or aiding and abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.
>
> Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist.
>
> Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of government of the U.S. by unconstitutional means.
>
> Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

There is nothing in the files, or in the record in this case, which discloses that these criteria were ever made public, made available to other members of the Secret Service, or made available to either of plaintiffs prior to or subsequent to denial of their press pass applications.

V. FIRST AMENDMENT CLAIM

Defendants, citing Zemel v. Rusk, 381 U.S. 1 (1965),

argue that no First Amendment right is involved here. In Zemel, a United States citizen whose passport application for travel to Cuba had been denied, argued that the denial abridged his First Amendment right to gather information. The Court rejected the argument, stating:

> We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.

381 U.S. at 16-17. Defendants would apply this language to the instant case and argue that because their actions have inhibited the plaintiffs' action (in entering the White House) rather than their speech, no First Amendment right is involved.

To apply Zemel to the instant case in the manner contemplated by defendants would require an unfounded and overbroad interpretation of Zemel as well as a repudiation of subsequent case law. Zemel did not address or consider the problem of restrictions on the newsgathering ability of a member of the press. While it is true that a newsman has no constitutional right of access "beyond that afforded the general public," Pell v. Procunier, 417 U.S. 817, 834 (1974), it has been recognized that "newsgathering is not without its First Amendment protections." Branzburg v. Hayes, 408 U.S 665, 707(1972). Newsgathering itself is "action" rather than "speech," but restriction of newsgathering necessarily restricts the freedom of the press to print the news.[3/] After Branzburg and Pell, it cannot

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3/ In Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court held that the First Amendment was applicable to the government's decision to bar a nonresident alien academic from entering the country "to participate with [American citizens] in colloquia, debates, and discussion in the United States." 408 U.S. at 764. The Court distinguished Zemel by stating that where the attempted restriction, although facially applicable to the "action" of the nonresident alien (who was without first amendment protection), in effect infringed upon the "right to receive information" of the American citizens, the First Amendment applies to the government decision. 408 U.S. at 764-65.

legitimately be argued that newsgathering is unprotected by the First Amendment, and other courts have so held. See Borreca v. Fasi, 369 F. Supp. 906, 908-09 (D. Haw. 1974); Lewis v. Baxley, 368 F. Supp. 768, 777 (M.D. Ala. 1973) (three judge court).

It next must be determined whether defendants' actions violated plaintiffs' First Amendment rights. Before analyzing the applicable case law, it is important to note precisely what is at issue. Plaintiffs do not contend that reasonable restrictions cannot be placed on press access to the White House. Because the only articulated governmental interest at issue here is the safety of the President, there is no argument that restrictions based upon that interest cannot be imposed. Plaintiffs do contend, and this is the heart of their case, that restrictions based upon the need for presidential safety must be imposed in a nondiscriminatory manner and pursuant to specific, narrowly defined guidelines. With that in mind, the cases dealing with plaintiffs' contention will now be addressed.

In Consumers Union of U.S., Inc. v. Periodical Correspondents' Association, 365 F. Supp. 18 (D.D.C. 1973), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, _____ U.S. _____, 96 S. Ct. 780 (1976), Judge Gesell considered the constitutionality of the denial of a press pass application made by Consumers Union for access to the Senate and House Periodical Press Galleries. The major portion of Consumers Union's revenue is derived from its publication "Consumer Reports" and it was for this periodical that Consumers Union sought access to the Galleries for its reporters. The stated reason for the denial was Consumers Union's failure to meet the requirements of Rule 2 of the Rules Governing Periodical Press Galleries, which states that access must be denied to a publication which is not "owned and operated independently of any industry, business, association, or institution." 365 F. Supp. at 22. After determining that the case presented a justiciable controversy (a determination that the Court of Appeals later reversed), Judge Gesell upheld plaintiff's claim that the denial violated its First Amendment right to freedom of the press and its Fifth Amendment right to due process and equal protection

of the law. Recognizing that "reporters do not have an unrestricted right to go where they please in search of news," Judge Gesell nonetheless stated:

> [T]he elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering presents a wholly different situation. Access to news, if unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, constitutes a direct limitation upon the content of the news.

365 F. Supp. at 25-26. The court concluded:

> Exclusion of a publication from the galleries can only be sanctioned under carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interest. [cites omitted] Such rules must, among other things, be so fashioned that due process is provided prior to exclusion, with opportunity for adequate impartial review wherever a publication is excluded. [cite omitted]

365 F. Supp. at 26-27. 4/

In Quad-City Community News Service, Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1871), the police department in Davenport, Iowa, had denied press passes and access to police records, otherwise available to the press, to the reporters for "Challenge," an underground newspaper. At trial, the reasons given in support of the denial were that the newspaper was not a "legitimate" or "established" newspaper, and further, that certain of the paper's reporters had been convicted of felonies. 334 F. Supp. at 12. There was no written policy defining "legitimate" or "established" press, nor were there any written or published standards or guidelines for issuance of press passes. Id. Moreover, the record showed that prior to the litigation, the defendants had refused to give plaintiff any reason for denial of the press pass application, or to inform plaintiff how it could qualify for a pass. 334 F. Supp. at 16. The court found the discriminatory treatment violative of the First and Fourteenth Amendments because no

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4/ The Court of Appeals, although not reaching the merits, intimated its disagreement with the application of these principles to the facts of the case. Specifically, it noted that the rule challenged did not disadvantage plaintiff relative to the public or press generally and that the distinctions established by the rule were applied equally. See 515 F.2d at 1346-47. It did not comment upon the problem of vagueness, which seemed to be the principal rationale for Judge Gesell's opinion, as the language quoted above indicates, and which is at the heart of the instant case.

compelling state interest was shown. Further, and more importantly for the purposes of the instant case, the court found the vagueness or nonexistence of any written standards or regulations governing issuance of press passes violated the plaintiff's First Amendment right to freedom of the press and its Fourteenth Amendment right to procedural due process. The court pointed out that plaintiff, as here, did not contend that the press has an unrestricted right of access to all records or public events, but instead argued that the decision to restrict could not be made in a discriminatory manner. In language directly applicable to the instant case, the court stated:

> It must be apparent that where public officials in making decisions such as here involved, use [or] employ criteria or reasons that are either vague or completely unknown, the party affected has no way of knowing how to achieve compliance with the criteria nor even of challenging them as being improper. In such situations, the public officials literally have unimpeded discretion to regulate the activity in question in whatever manner they desire.
>
> Regulation in the area of free expression can only be tolerated when a public official's discretion is guided by narrow and specific standards which advance a compelling state interest. [cites omitted].

334 F. Supp. at 17.

The Quaker Action litigation, involving four cases before the court of appeals for this circuit, affords further substantial guidance to resolution of the issues in the instant case, not only because it treats with First Amendment expression, but also because it analyzes and balances the governmental interest in the physical safety of the President. The Quaker Action litigation, originally commenced in 1969, involved the constitutionality of certain policies, and later regulations, instituted and enforced by the Department of the Interior concerning the issuance of permits for, and the size of, demonstrations near the White House. The policies/regulations required that a permit be obtained for gatherings at Lafayette Park and on the White House sidewalk, and also barred any demonstrations that would exceed 100 persons on the sidewalk or 500 persons in the Park. Several groups wishing to demonstrate in May 1969 were refused permits because they exceeded the size limitations. Judge Bryant issued a preliminary injunction, which was immediately appealed.

In Quaker Action I,[5] the court of appeals affirmed the preliminary injunction, but modified it to require prior notice of a demonstration so that the Interior Department could seek a court order enjoining a particular demonstration. The modification was necessitated "[B]ecause of the peculiar sensitivity of one issue involved -- the safety of the President," which of course is central to the case before this Court as well. 421 F.2d at 1113. Addressing the "paramount interest" of the state in the safety of the President, the court made the following comments:

> [T]he Government has injected an additional, and most important, element into the case by arguing that large demonstrations threaten the safety of the President. This, of course, is a paramount interest underscored in importance by the tragic assassinations in recent years. But we cannot agree with the Government's argument that mere mention of the President's safety must be allowed to trump any First Amendment issue. While courts must listen with utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President we must also assure ourselves that those conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat.
>
> The Government suggests that the importance and delicacy of any decision affecting the President's safety requires this court to limit its review to a determination whether the decision was "wholly rational." We do not agree. . . . [A]bsent a compelling showing -- which has not been begun here -- that courts cannot evaluate the questions of fact involved in estimating danger to the President, the final judgment must rest with the courts.

421 F.2d at 1117-18.

In Quaker Action II,[6] the court of appeals reversed Judge Hart's grant of summary judgment to the government in order that an evidentiary hearing be held to more fully develop the issues. The court was particularly concerned with allegations of discriminatory administration of the permit system, found by Judge Bryant to be supported by the evidence when he issued the preliminary injunction, but not addressed by Judge Hart in his judgment for the government. According to the court of appeals, "[t]he authority to prohibit picketing does not establish as a

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5/ A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969).

6/ A Quaker Action Group v. Hickel, 429 F.2d 185 (D.C. Cir. 1970).

corollary the authority to establish unreasonable rules for determining which picketing will be permitted and which denied." 429 F.2d at 187. Further, the court was concerned with the factually untested assertions of the government that the 100/500 limitations were reasonable, especially in light of the fact that they were established, "not in a regulation or even public notice, but in an internal memorandum to subordinate officials administering the permit system." Id.

In Quaker Action III,[7] the court again reversed a grant of summary judgment to defendants. Although Judge Hart initially had been disposed to conduct an evidentiary hearing as directed by the remand in Quaker Action II, the government argued that because the Secretary of the Interior had in the interim issued regulations -- superseding the simple policy directive included in the intra-agency memorandum -- the court's review was now limited to a determination of the existence of substantial evidence to support the regulations. Judge Hart agreed, and granted summary judgment for the government. The court of appeals reversed. In doing so, it reiterated that "incidental restriction on alleged First Amendment freedoms," resulting from attempted furtherance of a governmental interest, can be "no greater than is essential to furtherance of that governmental interest." 460 F.2d at 860. The court further stated:

> Of course the health and safety of the President are of concern to the citizenry. But this only poses, it does not answer, the question as to whether the officials involved have transformed this concern into an excessive preoccupation with security that is achieved at the unnecessary expense of First Amendment freedoms.

Id. Accordingly, the case was remanded for a trial on the merits regarding, among other things, "[t]he issues concerning the scope of the regulations and the need for their extent and restrictiveness." Id.

Finally, in Quaker Action IV,[8] the court of appeals resolved the case on its merits. Essentially, it upheld the judgment of the district court, although modifying it in certain respects.

7/ A Quaker Action Group v. Morton, 460 F.2d 854 (D.C. Cir. 1971).

8/ A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975).

In doing so, the court set out the standards by which cases similar to the case before this Court must be judged. First, the court must find that the government "balance[d] the First Amendment rights against the other legitimate interests to arrive at a reconciliation that is both constitutional and an acceptable accommodation of all the factors." Second, the scheme constructed by the government must not "risk abuse of First Amendment rights through a broad censorship power or other improper application of theoretically acceptable restraints." 516 F.2d at 725. The restriction on expression must further an important or substantial governmental interest, the governmental interest must be unrelated to the suppression of free expression, and the incidental restrictic on alleged First Amendment rights must be no greater than is essential to the furtherance of that interest. 516 F.2d at 725-26.

Particularly applicable to the instant case is the challenge by plaintiffs in Quaker Action IV to a regulation authorizing rejection of demonstration permits if "[i]t reasonably appears that the proposed gathering will present a clear and present danger to the public safety, good order, or health . . ." The court of appeals found this regulation not to be vague or overbroad:

> Given the uniqueness and importance of the security interest of protection of the White House as justifying a greater limitation than would be applicable generally to use of public streets and parks, we conclude that the Constitution is not offended by the standard in the regulation, limited as it is (1) to the presence of a clear and present danger, that is (2) confined to the need to protect public safety and public health (including in public safety the avoidance of disorder).
>
> . . . .
>
> The regulations before us do not extend to categories as amorphous as welfare, decency and convenience. And they do not define the granting of the permit in terms of the subjective judgment of the officials. The regulations before us are defined in terms of substantive criteria and the courts are open in the event of maladministration to hear the concrete evidence in support of such a complaint.

516 F.2d at 729.

The case presently before the Court is a prime example of the improper governmental action that Consumers Union, Quad-City Community News, and the Quaker Action litigation attempt to foreclose. To be sure, the interest asserted here by the

government -- protection of the physical safety of the President -- is a compelling, if not "paramount" interest.[9] Furtherance of that interest, however, when it conflicts with valid First Amendment rights, must be achieved through standards narrowly and specifically drawn to ensure that the subjective judgment of the officials does not result in unnecessary restriction, or abusive censorship, based upon an applicant's political tenets rather than the danger he poses to the President's physical safety. The only set of standards which have been made public are those contained in a memorandum from a special agent in charge to another Secret Service official. See page 10 supra. Those standards are extremely broad and vague, and it is questionable whether they would withstand constitutional scrutiny. Even if they could, however, there is no indication that they have been approved by the head of the agency, that they are uniformly followed, or that they are even known to other members of the agency. Moreover, it is clear that those standards were not made known to the plaintiffs or to any other person who might wish to obtain a White House press pass. In the absence of such a showing, the only "standard" advanced by the defendants which this Court could adjudge is "reasons of security." Accepting the fact that protection of the President permits "a greater limitation than would be applicable generally" to First Amendment expression, Quaker Action IV, supra at 729, the "reasons of security" standard advanced by defendants could not be broader, more vaguely worded, nor more pregnant with the possibility of agency abuse. As in Quad-City Community News, supra, it affords agency officials practically "unimpeded discretion to regulate the activity in question in whatever manner they desire." 334 F. Supp. at 17.[10]

Defendants would have the court uphold their action in denying plaintiffs' applications based upon the record as it has been disclosed to plaintiffs. See note 1, supra. If this were the appropriate task at this point, there would be ample justification

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9/ "The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive . . ." Watts v. United States, 394 U.S. 705, 707 (1969).

10/ This is not to say that the defendants have in fact abused their self-award discretion in the instant case. There are no facts in the record which would intimate that the reasons underlying the denial of plaintiffs' applications were other than danger to the physical security of the President.

for reversing th decision with regard to p intiff [redacted] b6 b7C particularly in light of the two relatively minor incidents relied upon by defendants, one of which is unsupported by any direct evidence of its nature or occurrence. Although there is more substantial evidence which might form a sufficient basis for the denial of plaintiff Forcade's application, much of the evidence is hearsay, none of it has been subjected to even the most rudimentary cross-examination, and in the absence of any standards, it is impossible for this Court to make a reasoned decision about the danger to presidential security posed by the actions of plaintiff Forcade.

Under Quaker Action I, supra, this Court must undertake a de novo review in determining the propriety of the agency action. To do so at this time, however, would be inappropriate. In order to undertake a proper de novo review, fully recognizing that "courts must listen with utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President," Quaker Action I, supra at 1117, it is necessary first that the Secret Service -- which in the first instance possesses the requisite expertise in presidential security -- articulate in as precise terms as possible the standards for issuance and denial of White House press passes. See Women Strike for Peace v. Morton, 420 F.2d 597, 603 (D.C. Cir. 1969). Second, it is incumbent that a written decision by the defendants issue which applies the standards to the facts of each plaintiff's case, denotes the particular events or considerations supporting its decisions, and fully states the reasons why those events or considerations necessitate denial of the application. Only upon completion of this process would the court be sufficiently informed to render its de novo determination. 11/

11/ Remanding to the agency for further proceeding would, of course, result in substantial delay to both plaintiffs. It may be that upon review of either or both applications, defendants may reverse their earlier decisions. Moreover, a time limit can be placed upon the agency, for example, 120 days. In the absence of any quick reversal, however, the interest in the physical safety of the President mandates that the Court proceed with the utmost caution. As the Court of Appeals noted in Quaker Action I:

> In a suit involving private parties, we might well find that such a failure of proof entitled the appellant [Government] to the consequences. But the safety of the President cannot be endangered merely because the Government has wholly failed to support its arguments.

421 F.2d at 1119

The main thrust of defendants' argument is that summary decisions regarding press pass applications are not only proper but necessary because "[t]he matter is not subject to a formalistic determination and must be made on the basis of the special expertise gained by the Secret Service since 1902." Def. Mem. at 23. This, of course, overlooks the fact that the defendants have, at least internally, attempted to get general standards for ingress and egress to the White House. See Wong Memorandum, p. 10 supra. Moreover, such a statement is made in the absence of any proffered standards at all. There has been no attempt to publicly establish standards of any degree of specificity with a concomitant explanation of the defendants' inability to further narrow or specify them. Without even an attempt, it is difficult to accept the broad assertion of defendants in good faith.[12/]

VI. FIFTH AMENDMENT

It only remains to determine the nature of the proceeding before the agency. In doing so, the two different theories of plaintiffs' complaint become somewhat merged. To this point, the discussion has centered upon the strictures of the First Amendment and their applicability to the instant case. The conclusion has been that defendants have not proceeded within these strictures, but that before any relief is granted plaintiffs individually, the agency must undertake certain actions to define the applicable standards, to apply those standards to the plaintiffs' cases, and to render written decisions in each case. Articulation and publication of applicable standards are required by the First Amendment to insure

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12/ Although it is unnecessary to reach defendants' argument that summary control over access to the White House is permitted and authorized by statute, resolution of the argument would be adverse to defendants' position. There is nothing in either 3 U.S.C. § 202 or 18 U.S.C. § 3056, relied upon by defendants, that even implies that the authority of the Secret Service is unchecked by any procedural requirements, or that Congress intended that the Secret Service carry out its authorized duty without regard to First or Fifth Amendment rights. In the absence of explicit statutory authorization to preempt traditional constitutional guarantees, defendants' statutory argument must fail. See Greene v. McElroy, 360 U.S. 474, 496, 507 (1959).

that a government official does not have unbridled discretion in passing upon plaintiffs' applications; the application of the standard to the facts of this case, in a written decision, is necessa under the First Amendment to enable this Court adequately to discharg its duty of reviewing the agency decision de novo. Whether plaintiffs have a right to confront and cross-examine witnesses, to be informed of the evidence against them, and to rebut that evidence, is a question not answerable under the First Amendment. If plaintiffs possess such rights, it is the Due Process Clause of the Fifth Amendment which affords them.

Defendants' first contention is that the Due Process Clause does not apply to the instant case because plaintiffs have not been deprived totally of any opportunity for employment, but have only been barred from exercising their chosen profession in one arena, the White House. Plaintiffs respond that a partial but substantial impairment of their ability to carry out their employment constitutes a deprivation of due process requiring application of the Due Process Clause. The requirements of the procedural due process apply "to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 465, 569 (1972). And it is clear that "the right to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty'" concept of the Due Process Clause. Greene v. McElroy, 360 U.S. 474, 492 (1959); Shaw v. Hospital Authority of Cobb County, 507 F.2d 625, 628 (5th Cir. 1975); Gilmour v. New York State Racing & Wagering Bd., 405 F. Supp. 458, 459-60 (S.D.N.Y. 1975). It is immaterial whether the governmental interference amounts to a total preclusion from a chosen profession or only a partial interference with the free exercise of that profession. See Shaw, supra (denial of podiatrist application for staff membership at one of several hospitals); Gilmour, supra (denial of application to participate in harness races in New York). Here, plaintiffs have introduced uncontradicted affidavits that the denial of their press pass applications has been an "increasing impediment" to their professional work, by "greatly restricting" news sources in Washington, D.C. See [redacted] Forcade Affidavits.

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Plaintiffs are entitled to procedural due process. See Greene, supra; Shaw, supra; Gilmour, supra.

The next question is what process is due. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action." Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring). The government function involved here, protection of the physical security of the President, is of "paramount" importance. See Quaker Action I, supra. The government has a further interest in maintaining the confidentiality of its sources who provide it with information necessary to determine the danger that a particular individual might pose to the physical safety of the President. On the other hand, the particular plaintiffs now before the Court, and perhaps more importantly, the public at large, have an interest in nondiscriminatory access to White House press conferences and other privileges afforded the holder of a press pass. This interest is, of course, quite substantial, finding its roots in the First Amendment's guarantee of freedom of the press.

The conflict between these interests would arise only if the government in its decision to deny an application chose to rely in whole or in part upon information determined to be nondisclosable because coming from a confidential informant. Although the informant's privilege may preclude production of certain evidence or documents to a White House press pass applicant, the question remains whether the agency, in the context of this case, may base its denial of a press pass application on evidence, the nature or source of which is not disclosed to the applicant.

At this point, it is incumbent to remember that the private interest involved in this action is not merely that of an individual seeking to gather information. If that were the only interest, it might very well be that, considering the necessity for the ongoing protection of the President, the agency would not need to disclose the source of its evidence against the applicant. It is not merely the interest of one individual in seeking to gather

information which is at stake, however, for denial of White House access to differing viewpoints of the press deprives the public of the uninhibited, robust debate which is at the heart of the First Amendment.[13/]

The substantial and fundamental importance of the private interest involved here only serves to underscore the need for application of the "relatively immutable" principle of our jurisprudence recognized in Greene v. McElroy, supra:

> [W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

360 U.S. at 496-97. The Court of Appeals has applied this principle in a case similar to the one at bar. In States Marine Lines, Inc. v. Federal Maritime Comm'n, 376 F.2d 230 (D.C. Cir. 1967), the court had to determine the procedural fairness of the self-policing system of the shipping industry. After determining that the industry was sufficiently infused with monopolistic tendencies, governmental regulation, and the public interest to require application of procedural due process, the court analyzed the various deficiencies in the self-policing system. Of prime concern to the court was the prohibition of disclosure to the shipping firm accused of improper practices of the name of the complainant or of any information considered by the factfinder which would tend to disclose the identity of the complainant. The court found that the system did not prohibit a factfinder "from basing its decision on evidence the accused has no chance to confront in original form." 376 F.2d at 240. States Marine's contention that the self-policing system conflicted with the principle of Greene v. McElroy was, according to the court, "well founded." Id. It ordered the case remanded to the Federal Maritime Commission for development of a new self-policing system that "provide[s] reasonable assurance

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13/ As Judge Learned Hand has stated, the First Amendment

> presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain -- in other words, that the accused will in fact be treated fairly." 376 F.2d at 242.

This is not to say that the Secret Service would be required to disclose the identity of a confidential informant, either directly or through disclosure of information tending to reveal the informant's identity. But if the Secret Service chooses to base its decision to deny a press pass application upon evidence which has been obtained from a confidential source, it must provide the applicant with an "adequate opportunity to rebut or explain" that evidence. Whether this would require disclosure of the informant's identity can only be determined within the context of a particular case.[14/] If it determines not to reveal the source's identity, and if such action would preclude an "adequate opportunity to rebut or explain," then the agency cannot base its decision on the evidence provided it by the source.

The Court need not further specify the scope of the procedures. It is sufficient to hold here that the Secret Service, within a reasonable period of time[15/] after application for a press pass, must render a decision based upon narrow, specifically defined, and publicized standards. If the decision is to be adverse to the applicant, he must, prior to the final decision, be informed of the evidence against him, the standards which the evidence contravenes, and the grounds for the contemplated denial, and further, he must be afforded an opportunity to rebut or explain the evidence or grounds upon which the contemplated denial is based. If after an "adequate opportunity to rebut or explain," the decision is still adverse to the applicant, then the Secret Service must issue a written decision specifying the grounds and outlining the

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14/ For example, in Forcade's case, it might not be necessary to reveal the identity of a confidential source within the camp of Forcade's followers, if the evidence related to the Secret Service was of a public nature -- such as the glass throwing incident at the San Diego convention in 1969 -- and could be rebutted without the need for cross-examination of the source. On the other hand, where the source was the only witness to an alleged statement or act of Forcade's, the need to cross-examine the source might require disclosure of his identity.

15/ It is contemplated that the standards to be promulgated will include time limitations.

evidence for the decision. The nature of the "opportunity to rebut or explain" need not be determined in any greater detail at this time. Whether the rebuttal need be oral or in writing will depend upon the facts of each case, depending upon, among other things, the importance of the issue of credibility and the nature of the offense which is the basis for the agency's decision. Not being immediately familiar with the entire range of issues or evidence which comes before the Secret Service, this Court should initially defer to the defendants to afford them an opportunity to determine and devise rules within which decision to issue press applications should be made.

VII. CONCLUSION

From the foregoing the Court holds: (1) that defendants' failure to devise, publicize, and utilize narrow and specific standards for the issuance or denial of press passes infringes on plaintiffs' First Amendment right to freedom of the press; (2) that defendants' failure to inform plaintiffs of the evidence or grounds of the decision to deny their press pass applications, or to permit them an adequate opportunity to rebut or explain the evidence or grounds, violates their Fifth Amendment right to procedural due process; (3) that the case be remanded to the Secret Service to devise and publicize narrow and specific standards for the issuance or denial of press pass application, to consider plaintiffs' applications within the context of the newly devised standards, and to render a written decision specifying the grounds for denial, if that be the decision, after affording plaintiffs an adequate opportunity to rebut or explain any evidence or grounds upon which the agency bases its denial. An appropriate order is being entered simultaneously with this Memorandum.

CHIEF JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS K. FORCADE, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Action No. 73-1258
	)	
H. STUART KNIGHT, et al.,	)	
	)	
Defendants	)	

ORDER

Upon consideration of plaintiffs' motion for summary judgment, defendants' motion to dismiss or in the alternative for summary judgment, the memoranda and exhibits submitted in support thereof and in opposition thereto, and in accordance with the Memorandum of the Court entered this same day, it is this 15 day of July, 1976, without a hearing pursuant to Local Rule 1-9(f),

ORDERED that plaintiffs' motion be and the same hereby is granted; and it is further

ORDERED that defendants' motion be and the same hereby is denied; and it is further

ORDERED that defendants within 180 days of the date of this Order, devise and publicize constitutionally narrow and specific standards for the issuance or denial of press pass applications, reconsider plaintiffs' applications within the context of the newly devised standards, and render a written decision specifying the grounds and outlining the evidence upon which they base the denial, if that be the decision, and affording plaintiffs an adequate opportunity to rebut or explain any evidence or grounds upon which they base the denial.

CHIEF JUDGE